The Pacific Bank Bhd v Chan Peng Leong

COURT OF APPEAL (KUALA LUMPUR) — APPEAL NO N-02-572 OF 1995
GOPAL SRI RAM, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
16 AND 23 JANUARY 1998

Civil Procedure *— Res judicata — Decision, finality of earlier decision — Appellant sued respondent on a guarantee — High Court held demand to be bad and struck out action — Failure by respondent to make payment under fresh demand — Second action struck out under res judicata — Whether appellant could have brought fresh demand — Whether judge was wrong in striking out second action*

On 4 October 1988, the appellant commenced an action against the respondent and five other defendants for the recovery of monies owed it ('the first action'). The respondent was sued on a guarantee he had given which was enforceable on demand. The appellant obtained judgment against all the other defendants in the first action. The respondent, however, applied to strike out the bank's statement of claim on the ground that no proper demand had been made of him. He attacked the contents of the letter which made the demand. The High Court held the demand to be bad and the first action was accordingly struck out.

On 26 March 1994, the appellant made a fresh demand of the respondent. The respondent did not make payment and the appellant sued him again ('the second action'). The respondent applied to strike out the second action as well. He did not question the validity of the new demand but argued that the decision in the earlier action had rendered the dispute res judicata so that the bank could not re-agitate its claim against him under the guarantee he had given. The judge agreed with this argument and struck out the second action. The appellant appealed against that decision. The issue in this appeal is whether the bank, having given a demand, which, by judicial determination, was found to be defective, can issue a fresh demand in order to enforce the guarantee given it by the respondent.

Counsel for the respondent argued that the position would have been different if the bank had withdrawn the first action with liberty to file afresh. He contended that in such an event the bank could have brought the second action based upon a fresh letter of demand. It could not do so in the present circumstances since it went forward with its case in the first action.

Held, allowing the appeal:

(1) (Per **Gopal Sri Ram JCA**) It is of the essence, in cases of this nature, when the plea of res judicata is taken, to identify with precision the point in issue that was decided in the earlier proceedings, which it is contended operates as a bar to relitigation. In the present instance, the point in issue in the first action that was determined necessarily and with precision was that the

demand upon which that action was based was invalid. There was, in other words, no demand. The first action had, therefore, been commenced prematurely. If one action on the guarantee is dismissed because no demand was made, this does not bar recovery of the same amounts under the guarantee in a second action. The bank was accordingly at liberty to issue a proper demand and to institute proceedings to enforce the guarantee based upon that demand. Neither res judicata, nor issue estoppel, nor cause of action estoppel operated to bar the second action. It cannot be dismissed on the basis that it is brought in respect of the same cause because, in the absence of a demand, no cause of action arose when the first proceedings were issued. The judge was wrong in striking out the second action as it was based upon an entirely fresh demand which is not under attack (see pp 619I and 620B–E); *Anglo-Canadian Mortgage Investment Corp v Shaw* (1921) 59 DLR 152 and *Ruben v Royal Bank of Canada* (1980) 110 DLR 501 followed.

(2) (Per **Ahmad Fairuz JCA**) In this case, the doctrine of res judicata does not apply to obstruct the appellant in his action. The appellant also contended that substantive issues put forward by the appellant in his affidavit in reply in the proceedings to strike out his statement of claim were not considered by the High Court. The principle that courts exist to do justice according to the law as applied to the substantial merits of a particular case should be the basis of consideration by the courts in whatever case. Justice can only be obtained by all parties if substantive merit are given consideration (see pp 620I and 621A–D); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 followed.

(3) (Per **Mokhtar Sidin JCA**, dissenting) The claim by the appellant in the present appeal is the same and identical claim by the appellant against the respondent in the first action. When the first action was heard, the appellant, on discovering that the notice of demand was bad, could ask to withdraw the claim against the respondent with liberty. The appellant did not do so but went on to defend that the notice of demand was good. Once he chose that course, then he took the risk of the doctrine of res judicata being applicable to subsequent actions on the same amount (see p 626G); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 followed.

(4) (Per **Mokhtar Sidin JCA**) The appellant took an action against the respondent who raised the objection on the defect of the notice of demand. This objection that the notice of demand was bad was the only defence available to him. By allowing the appeal, the effect would be to demolish the only defence available to the respondent and judgment has to be entered against him. From the facts given, the doctrine of res judicata is applicable to the present appeal. The judge was right when he struck out the appellant's claim on this ground (see pp 626I and 627A).

A **[Bahasa Malaysia summary**

Pada 4 Oktober 1988, perayu telah memulakan tindakan terhadap penentang dan lima defendan lain untuk mendapat balik wang yang terhutang kepadanya ('tindakan pertama'). Penentang telah didakwa atas suatu gerenti yang diberikannya yang boleh dikuatkuasakan atas
B tuntutan. Perayu telah memperolehi penghakiman terhadap kesemua defendan lain dalam tindakan pertama. Walau bagaimanapun, penentang memohon untuk membatalkan pernyataan tuntutan bank atas alasan bahawa tiada tuntutan yang wajar telah dibuat terhadapnya. Dia mempersoalkan kandungan surat yang membuat tuntutan itu. Mahkamah Tinggi memutuskan tuntutan adalah tidak elok dan
C dengan itu tindakan pertama telah dibatalkan.

Pada 26 Mac 1994, perayu telah membuat tuntutan yang baru terhadap penentang. Penentang tidak membuat bayaran dan perayu telah mendakwanya sekali lagi ('tindakan kedua'). Penentang juga memohon untuk membatalkan tindakan kedua. Dia tidak
D mempersoalkan kesahan tuntutan yang baru tetapi berhujah bahawa keputusan dalam tindakan yang lebih awal telah menyebabkan pertikaian menjadi res judicata hinggakan mahkamah tidak boleh membentangkan semula tuntutan terhadapnya di bawah gerenti yang telah diberikannya. Hakim bersetuju dengan hujah ini dan membatalkan tindakan kedua. Perayu merayu terhadap keputusan
E itu. Isu dalam rayuan ini adalah sama ada, setelah mengeluarkan tuntutan yang didapati defektif melalui penentuan kehakiman, bank tersebut boleh mengeluarkan tuntutan baru bagi menguatkuasakan gerenti yang diberikan oleh penentang.

Peguam penentang menghujahkan bahawa kedudukan akan
F berbeza andainya bank tersebut telah menarik balik tindakan pertama dengan kebebasan untuk memfailkan tindakan baru. Beliau menghujahkan bahawa dalam keadaan sedemikian bank tersebut sepatutnya boleh membawa tindakan kedua berdasarkan surat tuntutan yang baru. Ia tidak dapat berbuat demikian dalam keadaan
G ini oleh kerana ia telah meneruskan kesnya dalam tindakan pertama.

Diputuskan, membenarkan rayuan:

(1) (Oleh **Gopal Sri Ram HMR**) Adalah menjadi intipati, dalam jenis kes ini, apabila hujah res judicata diambil, untuk mengenal pasti dengan kejituan hujah yang menjadi isu yang diputuskan
H dalam prosiding lebih awal, yang dihujahkan bertindak sebagai halangan kepada litigasi semula. Di sini, hujah utama dalam tindakan pertama yang ditentukan semestinya dan dengan ketepatan ialah bahawa tuntutan yang menjadi asas tindakan itu adalah tidak sah. Dalam perkataan lain, tiada apa-apa tuntutan.
I Maka, tindakan pertama telah dimulakan pramasa. Andainya satu tindakan atas gerenti ditolak kerana tiada tuntutan dibuat, ini tidak menyekat usaha mendapat balik amaun yang sama di bawah gerenti dalam tindakan yang kedua. Dengan itu, bank tersebut bebas untuk mengeluarkan tuntutan yang wajar dan

untuk memulakan prosiding bagi menguatkuasakan gerenti tersebut berdasarkan tuntutan itu. Baik res judicata, mahupun estopel isu, dan tidak juga estopel kausa tindakan bertindak untuk menghalang tindakan kedua. Ia tidak boleh ditolak atas dasar bahawa ia dibawa berhubung dengan kausa yang sama kerana, dalam ketiadaan satu tuntutan, tiada kausa tindakan berbangkit ketika prosiding pertama dikeluarkan. Hakim adalah salah dalam membatalkan tindakan kedua kerana ia berdasarkan tuntutan yang baru pada keseluruhannya yang tidak dipersoalkan (lihat ms 619I dan 620B–E); *Anglo-Canadian Mortgage Investment Corp v Shaw* (1921) 59 DLR 152 dan *Ruben v Royal Bank of Canada* (1980) 110 DLR 501 diikut.

(2) (Oleh **Ahmad Fairuz HMR**) Dalam kes ini, doktrin res judicata tidak terpakai untuk menyekat perayu dalam tindakannya. Perayu juga menghujahkan bahawa isu-isu substantif yang dibentangkan oleh perayu dalam afidavit jawapan dalam prosiding untuk membatalkan pernyataan tuntutan tidak dipertimbangkan oleh Mahkamah Tinggi. Prinsip bahawa mahkamah wujud untuk mencapai keadilan menurut undang-undang sepertimana yang terpakai kepada merit substantial suatu kes tertentu haruslah dijadikan dasar pertimbangan oleh mahkamah dalam apa-apa kes sekalipun. Keadilan hanya boleh didapati oleh semua pihak sekiranya merit substantif diberikan prtimbangan (lihat ms 620I dan 621A–D); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 diikut.

(3) (Oleh **Mokhtar Sidin HMR**, menentang) Tuntutan oleh perayu dalam rayuan ini sama dan serupa dengan tuntutan oleh perayu terhadap penentang dalam tindakan pertama. Apabila tindakan pertama didengar, setelah mendapati bahawa notis tuntutan adalah tidak elok, perayu boleh meminta supaya tuntutan terhadap penentang ditarik balik dengan kebebasan. Perayu tidak berbuat demikian tetapi terus mempertahankan bahawa notis tuntutan adalah elok. Sebaik sahaja dia memilih cara itu, kemudiannya dia mengambil risiko doktrin res judicata dijadikan terpakai kepada tindakan yang berikutnya atas amaun yang sama (lihat ms 626G); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 diikut.

(4) (Oleh **Mokhtar Sidin HMR**) Perayu telah mengambil tindakan terhadap penentang yang membangkitkan bantahan tentang kecacatan notis tuntutan. Bantahan bahawa notis tuntutan adalah tidak elok adalah satu-satunya pembelaan yang ada padanya. Dengan membenarkan rayuan, kesan adalah untuk memusnahkan satu-satunya pembelaan yang ada kepada penentang dan penghakiman hendaklah dimasukkan terhadapnya. Daripada fakta-fakta yang diberikan, doktrin res judicata terpakai kepada rayuan ini. Hakim adalah betul apabila beliau membatalkan tuntutan perayu atas alasan ini (lihat ms 626I dan 627A).]

Notes

For cases on the finality of earlier decision, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2899–2908.

Complete list of cases referred to

Anglo-Canadian Mortgage Investment Corp v Shaw (1921) 59 DLR 152 (folld)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (folld)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (folld)

Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610 (refd)

Ruben v Royal Bank of Canada (1980) 110 DLR 501 (folld)

Tong Lee Hwa & Anor v Lee Yoke San [1979] 1 MLJ 24 (refd)

Appeal from: Suit No 22–80 of 1994 (High Court, Seremban)

Rohayu binti Win (*Muthuvelu Param Rosdin & Co*) for the appellant.
Loy Chee Say (*Nahappan Dorairaj & Danker*) for the respondent.

Cur Adv Vult

23 January 1998

Gopal Sri Ram JCA: This appeal concerns the application of the doctrine of res judicata. It is a point of some importance. It gives rise to difficulty in particular cases from time to time. This is one such case. That is why we decided to reserve judgment at the close of argument.

The facts relevant to this appeal are not in dispute and may be shortly stated.

On 4 October 1988, the appellant (which I will refer to as 'the bank') commenced an action for the recovery of monies owed it. It was Civil Suit No 23–209–88. For convenience, I shall call it 'the first action'. There were six defendants. The instant respondent was one of them. He was the third defendant. He was sued as guarantor. The guarantee he gave was enforceable on demand. In accordance with high authority, a valid demand was essential before the bank could sue upon the guarantee. See *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610.

The bank obtained judgment against all the other defendants in the first action. The respondent, however, applied to strike out the bank's statement of claim. He moved on the ground that no proper demand had been made of him. He attacked the contents of the letter which made the demand. The bank resisted the application. The High Court, however, held the demand to be bad. The first action was accordingly struck out.

On 26 March 1994, the bank made a fresh demand of the respondent. The respondent did not make payment. So the bank sued him again. I shall refer to it as 'the second action'.

The respondent applied to strike out the second action as well. He did not question the validity of the new demand. But he argued that the decision in the earlier action had rendered the dispute res judicata so that the bank could not re-agitate its claim against him under the guarantee he had given. The judge agreed with this argument and struck out the second action. The bank has now appealed against that decision.

The critical issue upon which this appeal turns is whether the bank, having given a demand, which, by judicial determination, was found to be defective, can issue a fresh demand in order to enforce the guarantee given it by the respondent.

Counsel for the bank has argued that this question should receive an affirmative answer and should therefore be resolved in her client's favour. Counsel for the respondent has, however, argued that the question invites a negative response. He submitted that the position would have been different if the bank had withdrawn the first action with liberty to file afresh. He says that in such an event the bank could have brought the second action based upon a fresh letter of demand. It could not do so in the present circumstances since it went forward with its case in the first action.

Having given the matter much anxious consideration, I have come to the conclusion that counsel for the appellant is correct in her argument both on principle and authority.

So far as authority is concerned, the point is, I think, concluded against the appellant by the decision of the Saskatchewan Court of Appeal in *Anglo-Canadian Mortgage Investment Corp v Shaw* (1921) 59 DLR 152, the headnote to which reads as follows:

> If under the terms of an agreement for the purchase of land, a demand for payment is necessary before commencing action, and if prior to launching a first action the plaintiff has in fact made a demand for payment but at the trial of that action has failed to prove the demand and the action is dismissed, a subsequent action will not lie for the same cause, but if in fact no demand has been made, the dismissal of the first action is no bar to recovery in a second action, after demand has been made, because until a demand is made no cause of action exists and any action brought before demand is made is premature.

Lamont JA, when delivering the judgment of the court, said (at p 154):

> I agree with the trial judge that if, prior to the launching of the first action, the plaintiff had, in fact, made a demand on Shaw for payment, but at the trial of that action had failed to prove its demand and the action was consequently dismissed, a subsequent action would not lie for the same cause. If, however, no demand had, in fact, been made, the dismissal of the first action would be no bar to recovery in the second, because until a demand was made, no cause of action existed, and therefore, any action brought before demand was made was brought prematurely.

A In *Palmer v Temple* (1839) 9 Ad & El 508 at p 521; 112 ER 1304, Denman CJ says:

> 'And, in fact, the plaintiff had sued the defendant for this very deposit and the verdict had passed against him. But the evidence showed the ground of that verdict to be that the action was prematurely brought, viz before the contract was rescinded and before the defendant had
B disabled himself from completing it. The former judgment forms no obstacle to the recovery now that that event has taken place. It is like an action brought for the price of goods before the credit had expired, which would not prevent a recovery of the same goods after that period.'

In *Ruben v Royal Bank of Canada* (1980) 110 DLR 501, the defendant had
C guaranteed a loan from the plaintiff to a third party. The guarantee contained a clause which provided that: 'No suit based on this guarantee shall be instituted until demand of payment has been made'. The borrower defaulted. The plaintiff having made a demand of the defendant sued him upon his guarantee. It moved for summary judgment. The judge who heard the application held the demand to be insufficient and dismissed the
D summons for judgment. Later, the plaintiff took out a summons seeking leave of court to discontinue its action. Dickson J granted the application, but upon the condition that the defective letter of demand was not to be relied upon as the basis of any future action. The defendant appealed to the New Brunswick Court of Appeal, which dismissed his appeal.

E The judgment of the court was delivered by Hughes CJ (NB) who put the matter in this way:

> Under para 12 of the guarantee, no cause of action under the guarantee could be instituted 'until demand of payment has been made'. In his defence, the defendant did not specifically deny or plead as a defence the
F absence of the demand of payment, and it appears from the material before us, that the issue as to the sufficiency of the letter of 27 May 1977, as a demand, was not specifically raised until the hearing of the plaintiff's application to Mr Justice Stevenson for judgment on certain admissions made by the defendant upon his examination for discovery, whereupon the parties agreed Mr Justice Stevenson should consider and determine whether
G the letter was a sufficient demand. In his judgment on that issue, he held it was not. *If that decision is correct, the action was brought prematurely, and had the action been continued and been dismissed on the ground of the absence of a demand, judgment therein would not have been a bar to a second action brought after a proper demand had been made.* (Emphasis added.)

Anglo-Canadian Mortgage Investment Corp v Shaw was relied upon as
H authority in support of the conclusion arrived at on the point.

The propositions formulated in these cases by the Courts of Appeal of both provinces of Canada have not only the merit of logic in their support but also truly represent the law upon the subject. In my judgment, it is of the essence, in cases of this nature, when the plea of res judicata is taken,
I to identify with precision the issue that was decided in the earlier proceedings, which it is contended operates as a bar to relitigation because:

> ... to constitute a res judicata, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd*

> [1964] MLJ 49, 'necessarily and with precision' determine the point in issue (per Chang Min Tat FJ in *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24, affirmed on appeal to the Privy Council in [1981] 1 MLJ 54).

In the present instance, the point in issue in the first action that was determined necessarily and with precision was that the demand upon which that action was based was invalid. There was, in other words, no demand. The first action had therefore been commenced prematurely. The bank was accordingly at liberty to issue a proper demand and to institute proceedings to enforce the guarantee based upon that demand. In my judgment, neither res judicata, nor issue estoppel, nor cause of action estoppel operated to bar the second action.

I find the following passage in the first edition of the work by Donovan and Phillips entitled *The Modern Contract of Guarantee* (at p 380) to be an accurate statement of the law:

> Another result is that if one action on the guarantee is dismissed because no demand was made this does not bar recovery of the same amounts under the guarantee in a second action. The second action cannot be dismissed on the basis that it is brought in respect of the same 'cause' because, in the absence of a demand, no cause of action arose when the first proceedings were issued. The first action was simply brought prematurely.

In my judgment, the learned judge was clearly wrong in striking out the second action on the ground that it was barred by res judicata, when it was based, not upon the earlier invalid demand, but upon an entirely fresh demand which, as I earlier observed, is not under attack. He should have dismissed the respondent's application to strike out and permitted the second action to proceed.

For the reasons already given, I would allow this appeal, set aside the order of the learned judge and restore the bank's writ to file. The costs of the appeal and of the proceedings in the court below shall be taxed and be paid by the respondent to the bank.

16 January 1998

Ahmad Fairuz HMR: Saya telah berpeluang meneliti penghakiman-penghakiman Gopal Sri Ram dan Mokhtar Sidin HHMR. Penghakiman-penghakiman itu bersetuju bahawa rayuan ini melibatkan pemakaian doktrin res judicata. Fakta-fakta yang relevan kepada rayuan ini telah dihuraikan oleh Gopal Sri Ram HMR dalam penghakimannya.

Mengenai pemakaian doktrin res judicata, saya berpegang kepada kes yang sama yang dirujuk oleh Gopal Sri Ram HMR dalam penghakimannya — iaitu kes *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24. Kes ini dan kes *Ruben v Royal Bank of Canada* (1980) 110 DLR 501 (yang juga dirujuk oleh Gopal Sri Ram HMR dalam penghakimannya) telah menyebabkan saya bersetuju dengan Gopal Sri Ram HMR bahawa doktrin res judicata tidak boleh menghalang tindakan perayu dalam Guaman Sivil No 22–80–94.

Seperkara lagi yang dibangkitkan oleh perayu dalam afidavit jawapannya di dalam prosiding permohonan membatalkan penyata tuntutan dalam GS 22–80–94 itu ialah bahawa isu-isu substantial yang dikemukakan oleh perayu tidak pernah dibicarakan oleh Mahkamah Tinggi dalam GS 23–209–88. Perayu menegaskan bahawa tindakan itu (GS 23–209–88) telah dibatalkan hanya atas alasan bantahan prosedur. Dalam hal ini, saya teringat apa yang dikatakan oleh Gopal Sri Ram HMR semasa beliau memberi penghakiman Mahkamah Persekutuan dalam kes *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 di ms 342, iaitu:

> ... After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case.

Saya sedar bahawa perkataan-perkataan ini terdapat dalam konteks yang berlainan daripada konteks dalam rayuan ini. Namun demikian, saya percaya prinsip yang terkandung di dalam perkataan-perkataan itu wajar sekali dijadikan tunjak pertimbangan mahkamah-mahkamah dalam apa-apa kes jua. Dari pendekatan ini, saya yakin kesemua pihak dapat mengecapi keadilan jika merit substantif diberi pertimbangan.

Atas alasan-alasan tersebut di atas, saya membenarkan rayuan ini dengan kos seperti yang diperintahkan oleh Gopal Sri Ram HMR.

23 January 1998

Mokhtar Sidin JCA: The facts of this case leading to the present appeal are given in the judgment of my learned brother Gopal Sri Ram JCA and there is no necessity for me to repeat them except those which are relevant to my judgment.

It is clear from the facts that the appellant has in the first action gone all the way until a decision was made by the court. The issue in the first action was whether the notice of demand in that action was bad. The court held that the notice of demand was bad and the appellant's action was dismissed. There was no appeal against that decision. It is to be noted that the first action was commenced against the respondent with five others. It is clear to me that when the first action was heard the appellant has the opportunity of withdrawing the action against the respondent when the issue of improper service of notice of demand was raised. He elected not to do it but went all the way until the court made its decision. The appellant did not appeal but proceeded to issue a new notice of demand on the same amount under which the first action was dismissed. The appellant then proceeded to file another writ for the same amount. This is the action for which the appeal is before us. It is apparent to me that the second notice of demand upon which the appeal is pending is good because the respondent did not raise any objection. In the High Court, the respondent applied to strike out the second ground that the doctrine of res judicata applied.

It is common ground that the cause of action in both the first and the second writs are the one and the same, viz the amount owed by the

respondent to the appellant under a guarantee. That is the subject matter of both actions. Was the learned judge right when he allowed the application by the respondent to strike out the appellant's claim on the ground of res judicata?

Before us, it was the contention of the appellant that the principle of res judicata cannot apply because in the first action the appellant's claim was dismissed on the ground of technicality and the merit had not been argued. The respondent on the other hand contended that when the appellant went all the way to argue his case before the court and at the end a decision was made, then the doctrine of res judicata should apply.

In the present appeal, I wish to make it clear that from the facts as given in the record, it is apparent to me that there was a demand under the first action but the demand was bad and as a result the action was dismissed by the court.

The doctrine of res judicata has been explained by Peh Swee Chin FCJ in the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189. From the judgment, it is clear to me that his Lordship had done a thorough research on this and it serves as a good guide as to the application of the doctrine of res judicata. The explanation is so exhaustive so much so there is no necessity for me to refer to other authorities. At pp 197–202, his Lordship said:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effects of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdication, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.
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> Since a res judicata creates an estoppel *per rem judicatum*, the doctrine of res judicata is really the doctrine of estoppel *per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the res judicata is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.
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> The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 which is:
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> > 'The plea of res judicata applies, except in special cases, not only to point upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.'
>
> It may be of interest to point out that one of the exceptional special cases is the effect of a default judgment in subsequent proceedings between the

same parties, a default judgment is different from a final judgment on the merits, the latter is the category to which the judgment in the said originating motion given before the filing of the action as concerned directly herein below belongs. Please see the finer points of law in regard to default judgments from the position of the doctrine of res judicate in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49. We have thus mentioned this question of default judgment in passing as it has sometimes been a small source of confusion to the litigants.

To revert to that famous passage set out above, the next step is to state our view on its scope of operation or approach towards such scope which has given rise to certain controversial aspects referred to earlier. Bearing in mind the well-known relevancy of a previous judgment in barring a second suit, eg see s 40 of the Evidence Act 1950, it will be readily understood that when Wigram VC spoke of 'points', the points should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts of issues, and not just all issues of law or of fact that are in dispute between the parties. The relevant case law revolves itself into this understanding. Lack of this understanding causes, in our view, a fair share of the confusion in connection with the famous passage of Wigram VC which Shaw in *Hoystead v Taxation Commissioner* [1962] AC 155 at p 170 spoke of as 'settled law' in the Privy Council.

Thus, there are in fact two kinds of estoppel *per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.

The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is res judicata.

In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel *per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence. A few cases below will illustrate the point.

On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawlor v Gray* [1984] 3 All ER 345 at p 350, who said: 'Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action.'.

It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment.

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, *while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata, ie doctrine of estoppel per rem judicatum.*

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel *per rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

It is further necessary at this stage to understand the import of words in the said famous statement, ie '... every point which properly belonged to the subject of litigation ...' which Somervell LJ explained in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:

> '... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'

This explanation of Somervell LJ was also quoted with approval in the Privy Council in *Yat Tung Investment Co v Dae Heng Bank & Anor* [1975] AC 581; [1975] 2 WLR 690.

In *Yat Tung*'s case itself, the bank sold some property to Yat Tung which mortgaged the same property back to the bank. Yat Tung defaulted on payment of interest on the mortgage and the bank exercising its right of sale, sold the same property to the second respondent. After such sale to the second respondent, in 1969, Yat Tung sued the bank on the ground that the bank's sale of the property to Yat Tung in the first place was a sham and therefore a nullity and the bank counterclaimed for loss on resale to the second respondent, denying the alleged nullity. Yat Tung failed in this first action and the bank succeeded. After the judgment, Yat Tung sued in 1972 once more in a second action on the ground that the subsequent sale by the bank to the second respondent of the same property was fraudulent, etc on the ground of some collusion between the bank and the second respondent. It will be remembered that the sale to the second respondent took place before Yat Tung filed the earlier action. On appeal, and even further appeal to the judicial committee, the order was confirmed on the ground that the doctrine of res judicata applied.

Thus, in *SCF Finance Co Ltd v Masri & Anor (No 3)* [1987] QB 1028; [1987] 1 All ER 194, the English Court of Appeal held that even a reservation of an issue by a party in a previous proceeding was ineffective to prevent the

A estoppel from arising against the said party, where the said party had pleaded that issue but elected not to proceed on the issue in the previous proceeding. It was held she was not entitled to assert that issue afresh in subsequent proceedings, even if that issue was not heard and determined and it was even 'reserved'.

In *Bell v Holmes* [1956] 3 All ER 449; [1956] 1 WLR 1359, that the
B issue of the plaintiff's own liability for contributory negligence, when suing the defendant, was the same issue of both their respective liabilities towards a third person arising from the same collision in an earlier action, and the learned judge held that, after comparing the pleadings of the action before him and the pleadings in the previous county court proceedings, that the issues of fact and the evidence to support them were identically the same.
C The plaintiff was estopped from denying that he was 5% to blame as was adjudged in the previous county court action.

In *Hoystead v Taxation Commissioner* [1962] AC 155, in assessment for financial year 1918–1919, the trustees of a deceased person's estate claimed, by virtue of a certain section of a certain statute, a deduction of £5,000 in respect of each daughter of the deceased as the annual income was divisible
D among the testator's daughters. The claim was disputed and a case was stated for the High Court — which then decided that such deductions could be made for all the six surviving daughters. Subsequently, upon the assessment for the financial year 1920–1921, the commissioner this time allowed only one deduction contending that the daughters were not 'joint owners' within the meaning of that certain statute. The Privy Council held
E that though in previous litigation, no express decision was given whether the daughters were such joint owners, it being assumed and admitted they were, the admission that they were joint owners having been fundamental to the previous decision, the commissioner was estopped from asserting before the judicial committee that the daughters were not joint owners.

A word of caution is required about the words 'exercising reasonable
F diligence' in the said famous passage [in *Henderson v Henderson* (1843) 3 Hare 100]. The words do not, in our view, necessitate a mental exercise of making a finding as to whether there was diligence, or reasonable diligence, in the earlier failure to bring in at the previous trial, the issues which should have been brought in the earlier action and which were not, or in asserting all other causes of action arising out of the same facts in the earlier action
G and which were not.

The words ought to be understood as a gentle rebuke for the failure aforesaid, ie despite the fact that the party had the opportunity of bringing forward all such issues or asserting all such causes of action; and the words are not meant to impose a pre-condition for applying the doctrine of res judicata but are meant to say that the said non-bringing of the issues would
H count in any event irrespective of whether the said failure was or was not deliberate or due to inadvertence or negligence. Otherwise, the words would have virtually all but destroyed the efficacy of estoppel *per rem judicatum*.

Another source of small confusion is the rule that generally an estoppel,
I of which an estoppel *per rem judicatum* is a kind, as the name implies, has to be pleaded. But in *Superintendent of Pudu Prison v Sim Kie Chong* [1986] 1 MLJ 494 at p 498, Abdoolcader SCJ held to the effect that the court has the inherent jurisdiction to dismiss an action by applying the doctrine of res judicata against a party even if it has not been pleaded. We venture to think

> the reason for the ratio is that an estoppel or exclusion of evidence based on a question of public policy, ie in this case, the question of public policy that there should be finality in litigation, is more vigorous in excluding evidence and need not be pleaded, unlike an ordinary estoppel which should be pleaded.
>
> We think we have dealt with certain parts of the doctrine of res judicata sufficiently for the purpose of determining the instant appeal. (Emphasis added.)

His Lordship in the above passages have explained in detail on what facts the doctrine of res judicata shall apply. His Lordship has also given illustrations on how the doctrine shall operate. His Lordship also had distinguished the doctrines of res judicata and estoppel. I do not think there is anything clearer than what had been said by his Lordship.

Applying what had been said by his Lordship, let me now examine the facts of the present appeal. It is common ground that the respondent was one of the several guarantors to a loan given by the appellant to a company. The appellant took up action against all the guarantors including the respondent. The respondent was the only guarantor who challenged the validity of the notice of demand given by the appellant. It appears that the appellant succeeded in obtaining judgment against the other guarantors. The respondent took up a summons in chambers to strike out the appellant's claim against him on the ground that the notice of demand was bad. The respondent succeeded in striking out the claim against him. The appellant did not appeal against that decision but instead served a new notice of demand on the same amount as under the guarantee and then proceeded to file a fresh writ based on the second notice. The respondent again took up a summons in chambers to strike out the appellant's claim on the ground that the doctrine of res judicata is applicable to the second action. The learned judge allowed the respondent's summons in chambers and again struck out the plaintiff's claim. Hence the present appeal.

In my view, the claim by the appellant in the present appeal is the same and identical claim by the appellant against the respondent in the first action. When the first action was heard and as the respondent had stated, the appellant, on discovering that the notice of demand was bad, could ask to withdraw the claim against the respondent with liberty. The appellant did not do so but went on to defend that the notice of demand was good. In my view, once he chose that course, then he took the risk of the doctrine of res judicata being applicable to subsequent actions on the same amount.

In my view, there is finality on the first decision. As can be seen from the facts, the appellant took up action against the respondent and five others under the guarantee. Except for the respondent who has raised the objection on the defect of the notice of demand, the appellant proceeded to enter final judgment against the other five defendants. The respondent would have suffered the same fate had it not been for the objection (which was the only defence available to him) that the notice of demand was bad. By allowing the appeal, the effect would be to demolish the only defence available to the respondent and judgment has to be entered against the respondent as the fate of the other five.

A Thus from the facts given, I am of the view that the doctrine of res judicata is applicable to the present appeal. In my view, the learned judge was right when he struck out the appellant's claim on the ground that the doctrine of res judicata applied. I would therefore dismiss the appeal with costs.

B *Appeal allowed.*

Reported by David Lai

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